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## Advantages and Limitations of Current Employee Ownership Assistance Acts to Workers Facing a Plant Closure

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## *Notes*

### **Advantages and Limitations of Current Employee Ownership Assistance Acts to Workers Facing a Plant Closure**

Plant closures<sup>1</sup> are a serious problem in the United States. Job loss is a harsh reality or an ominous threat facing many American workers. In many instances, a plant closure not only affects individual employees, but also can devastate an entire community.<sup>2</sup>

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1. In this Note the term "plant closure" refers to the various ways a business may shut down: for instance, an employer may shut down only part of his/her business or the entire operation, or an employer may close down a plant in one area and reopen it in another location.

2. In 1982 more than 600 plants and factories across the United States shut down permanently, resulting in the loss of approximately 215,000 jobs. BUREAU OF NATIONAL AFFAIRS, INC., SUMMARY REPORT FOR 1982: LAYOFFS, PLANT CLOSINGS AND CONCESSION BARGAINING 3 (1983). A study by the California Employment Development Department found that in California between 1980 and 1983 at least 1,385 plants shut down, putting approximately 145,000 employees out of work. INSTITUTE OF GOVERNMENT STUDIES, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIFORNIA DATA BRIEF 1 (Sept. 1983) (citing EMPLOYMENT DATA & RESEARCH DIVISION, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CLOSED BUSINESS IN CALIFORNIA: FEBRUARY 1980—MAY 1983 (June 10, 1983)).

After a plant shutdown, workers often suffer from loss of income, prolonged unemployment, deteriorating mental and physical health, and increased family tensions. Most victims of plant closures have worked at the same job 10 or more years. For them, a layoff results in the loss of a career and secure employment. Many workers never again achieve their full earning capacity. Workers affected by plant closures experience increased occurrences of alcoholism, drug abuse, heart disease, and suicide. Social service agencies report increased occurrences of spouse and child abuse within the families of plant closure victims. Kay & Griffin, *Plant Closures: Assessing the Victim's Remedies*, 19 WILLAMETTE L.J. 199, 202-04 (1983); Office of Planning and Policy Development, California Employment Development Department, Planning Guidebook for Communities Facing a Plant Closure or Mass Layoff (1983) (copy on file with the *Hastings Law Journal*) [hereinafter cited as Planning Guidebook]; see also C. CHAVEZ, STAFF OF ASSEMBLY WAYS & MEANS COMMITTEE, A SUMMARY OF ISSUES RELATING TO PLANT CLOSURES, JOB DISLOCATION & MASS LAYOFFS 7 (1982) [hereinafter cited as WAYS & MEANS REPORT].

The impact on a community where a plant closure occurs goes well beyond the jobs lost at that plant. Unemployment may rise in secondary industries and local business which depend on economic input from the plant and its employees. A closure can mean a large reduction in the local tax revenue. As a result, public services such as police and fire protection, schools, and health and social service programs may be cut back at the time they are needed most. In Youngstown, Ohio, during the year after the Youngstown Sheet & Tube Company perma-

Plants close for many different reasons.<sup>3</sup> Sometimes a subsidiary plant is profitable, but not productive enough to meet the profit rate required by its corporate parent.<sup>4</sup> The parent company's overall business plans may no longer include the branch plant.<sup>5</sup> Sometimes the plant is simply no longer economically viable.<sup>6</sup> Outmoded equipment and facilities, the threat of foreign competition, shifts to overseas production, or a decline in the demand for the plant's products may contribute to the economic decline of a business.<sup>7</sup> Employees confronted with a plant closure have several legal options to help them stop a closure, limit its impact, or prepare themselves for its occurrence.<sup>8</sup> In some cases they can turn to the protections of the National Labor Relations Act (NLRA) to force the employer to bargain over the closure and its effects, to stop the closure if it is an attempt to destroy their union, or to enforce a collective bargaining agreement if it contains plant closing provisions.<sup>9</sup> Additionally, they may be able to utilize principles of contract law to establish an agreement between the employer and employees to keep the plant open, principles of eminent domain to have the business taken over by a local governmental unit, or other traditional legal theories.<sup>10</sup> Finally, a few state and local governments have adopted legislation that deals directly with the plant closure problem by requiring pre-notification of a closure or severance pay for the affected workers.<sup>11</sup> Such options, however, are available only in very special circumstances.<sup>12</sup>

Another response to plant closure has been to transfer ownership of the enterprise to the employees. In the last ten years employees have acquired approximately sixty firms which otherwise would have

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nently laid off 4,100 workers, the community lost an additional 1,650 to 3,600 jobs and millions of dollars in retail sales and state and local taxes. United States Representative William Ford (D. Mich.) has said that Youngstown was "as devastated as we left some cities in Europe after World War II." Kay & Griffin, *supra*, at 204; *Conference on Dislocated Workers*, 115 LAB. REL. REP. (BNA) 305, 306 (April 16, 1984); Planning Guidebook, *supra*, at 7-8.

3. See generally M. BOLLE, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, ISSUE BRIEF NO. IB80068, PLANT CLOSINGS AND RELOCATIONS 1-2 (1980); M. BOLLE, OVERVIEW OF PLANT CLOSING AND INDUSTRIAL MIGRATION ISSUES IN THE UNITED STATES 6-8 (1980) [hereinafter cited as M. BOLLE, OVERVIEW OF PLANT CLOSING]; C. SQUIRE, M. KIESCHNICK & J. PARZEN, AN EMPLOYEE BUYOUT HANDBOOK 1-2 (1983) [hereinafter cited as C. SQUIRE]; Bluestone & Harrison, *Why Corporations Close Profitable Plants*, WORKING PAPERS FOR A NEW SOC'Y 15 (May/June 1980); Boyle, *Plant Closings: Options for Economic Adjustment*, 6 ECON. DEV. COMMENTARY 17 (1982); Kay & Griffin, *supra* note 2, at 205-06.

4. C. SQUIRE, *supra* note 3, at 1-2; Bluestone & Harrison, *supra* note 3, at 16.

5. C. SQUIRE, *supra* note 3, at 2; Bluestone & Harrison, *supra* note 3, at 19.

6. See C. SQUIRE, *supra* note 3, at 1.

7. WAYS & MEANS REPORT, *supra* note 2, at 5.

8. See *infra* notes 28-65 & accompanying text.

9. 29 U.S.C. §§ 151-169 (1982); see *infra* notes 28-47 & accompanying text.

10. See *infra* notes 48-58 & accompanying text.

11. See *infra* notes 59-65 & accompanying text.

12. See, e.g., *infra* notes 28-65 & accompanying text.

closed.<sup>13</sup>

A successful employee buyout is an attractive alternative to a plant closure. A buyout can save jobs and reduce the effect of unemployment on the displaced workers and their communities.<sup>14</sup> State and local governments benefit from the continued payment of taxes by the employees and the business.<sup>15</sup> A buyout can also prevent an increased demand by the displaced workers for welfare, unemployment, and other types of government assistance.<sup>16</sup> Finally, a buyout may strengthen the economic base of the state and local community if employee ownership results in higher productivity.<sup>17</sup>

In recent years several states have enacted legislation to encourage employee ownership.<sup>18</sup> There are two types of such legislation: broadened ownership assistance acts (BOAAs)<sup>19</sup> and employee ownership

13. C. SQUIRE, *supra* note 3, at 1; L. WINTNER, RESEARCH BULLETIN NO. 140, EMPLOYEE BUYOUTS: AN ALTERNATIVE TO PLANT CLOSINGS I (1983) [hereinafter cited as L. WINTNER].

14. See WAYS & MEANS REPORT, *supra* note 2, at 7.

15. See *id.* at 8.

16. See *id.* at 7.

17. Employee ownership may not necessarily increase productivity and efficiency. Employees must also participate in the management of the business. If employees do participate, their motivation and productivity may rise because they have a personal as well as a financial stake in the business. Therefore, when legislators draft employee ownership legislation, they should consider how to encourage employee participation. See Long, *Worker Ownership and Job Attitudes: A Field Study*, 21 INDUS. REL. 196, 212 (1982); Stableski, *Do Employee-Owned Firms Lead to Higher Productivity?*, 8 WORLD OF WORK REP. 49 (1983); see also *Can Workplace Democracy Boost Productivity?*, 43 BUS. & SOC'Y REV. 10 (1982).

18. Employee Ownership Assistance Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West) (codified at CAL. GOV'T CODE § 91502.1(b)(3); scattered sections of CAL. UNEMP. INS. CODE (West Supp. 1984)); Employer Ownership Assistance Act, Pub. Act No. 82-991, 1982 Ill. Legis. Serv. 2584 (West) (codified at ILL. ANN. STAT. ch. 48, §§ 1301-1313 (Smith-Hurd Supp. 1983)); Broadened Ownership Act, ch. 821, 1980 Md. Laws 2868 (codified at MD. ANN. CODE art. 41, § 14J (1982)); Act of July 2, 1979, Pub. Act No. 44, 1979 Mich. Pub. Acts 62 (codified at MICH. COMP. LAWS ANN. § 450.751-.759 (Supp. 1983)) (lapsed 1984); Act of Dec. 31, 1982, ch. 15, 1983 Minn. Sess. Law Serv. 92 (West) (codified at MINN. STAT. ANN. § 290.26(2) (West Supp. 1984)); Employee Stock Ownership Plan Act, ch. 471, 1983 N.J. Sess. Law Serv. 2654 (West) (codified at N.J. STAT. ANN. §§ 52.27H-90 (West Supp. 1984)); Act of July 30, 1983, ch. 788, 1983 N.Y. Laws 1478 (codified at N.Y. PUB. AUTH. LAW §§ 1801(11)(a), (14), 1836(a)-(g) (McKinney Supp. 1983)).

Michigan's statute lapsed on July 2, 1984, as required by its sunset provision. MICH. COMP. LAWS ANN. § 450.759(i) (Supp. 1983). Currently pending in the Michigan legislature is a bill which would reenact and expand the state's EOAA. H.R. 5514, 82d Leg., Reg. Sess. (1984). H.R. 5514 would expand the Act's coverage to worker cooperatives and nonplant closure situations. It would also repeal the sunset provision. Other bills introduced at the same time as H.R. 5514 would create a loan program to help employee buyouts, give state preference in purchasing to employee-owned businesses, include employee owned corporations in the state's Economic Development Corporations Act, and allow employee-owned corporations to refund outstanding bonds in advance of redemption or maturity. H.R. 5510-5513, 82d Leg., Reg. Sess. (1984).

19. See, e.g., MD. ANN. CODE art. 41, § 14J (1982).

assistance acts (EOAAs).<sup>20</sup> BOAAs are designed to broaden the base of capital ownership.<sup>21</sup> EOAA's, on the other hand, are specifically designed to encourage employee buyouts, if feasible, in the event of a plant closure.<sup>22</sup>

This Note examines whether EOAA's adequately address the plant closure problem, focusing specifically on an EOAA recently passed in California. The Note first briefly reviews the legal options available to those adversely affected by a plant closure in the absence of state statutes that encourage employee ownership.<sup>23</sup> The Note then explains in detail the differences between BOAAs and EOAA's.<sup>24</sup> An analysis and review of several recently enacted EOAA's follows, including a detailed examination of California's EOAA.<sup>25</sup> The Note then discusses the general benefits and limitations of EOAA's, specifically California's, focusing on the problems that arise during the implementation of EOAA's due to the lack of guidelines and of a requirement that an employer give notice of a plant closure.<sup>26</sup> The author argues that EOAA's cannot effectively encourage employee buyouts of plants unless they contain adequate guidelines for implementation and notification requirements. Finally, the Note suggests how EOAA's could be improved to encourage more effectively employee buyouts of a closing plant.<sup>27</sup>

## Legal Options To Address Plant Closures

### Labor Law

Labor law provides several potential remedies for employees seeking to stop or to delay a plant closure.<sup>28</sup> For example, employees who have successfully negotiated for a collective bargaining agreement that contains provisions governing plant shutdowns may seek to enforce the agreement under section 301 of the Labor Management Relations Act.<sup>29</sup> Absent a specific provision governing plant closure, a decision to close operations may be arbitrable under the collective bargaining agreement, and the employees may seek an injunction preventing the shutdown

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20. See, e.g., MICH. COMP. LAWS ANN. § 450.751-.759 (Supp. 1983) (lapsed 1984).

21. See *infra* notes 84-92 & accompanying text.

22. See *infra* notes 93-97 & accompanying text.

23. See *infra* notes 27-65 & accompanying text.

24. See *infra* notes 81-100 & accompanying text.

25. See *infra* notes 104-39 & accompanying text.

26. See *infra* notes 140-65 & accompanying text.

27. See *infra* notes 166-68 & accompanying text.

28. This Note considers only those remedies available under federal labor law. The state labor codes which might be of particular interest here are those of states with EOAA's: California, Illinois, Michigan, and New York. In these states the labor codes have no specific provisions regarding plant closures.

29. 29 U.S.C. § 160 (1982). For further discussion of such suits, see *infra* notes 32-34 & accompanying text.

while arbitration is pending.<sup>30</sup> Finally, the motive for the closure or the manner in which it is conducted may provide the basis for the employees to file an unfair labor practice charge against the employer under either section 8(a)(3) or section 8(a)(5) of the NLRA.<sup>31</sup>

Employees are likely to be most successful under the NLRA when they have successfully negotiated for provisions in their union contract that limit transfer of work or unilateral management decisions to shut down a business.<sup>32</sup> Courts and arbitrators have enforced such provisions in a labor contract.<sup>33</sup> One impediment to this strategy is the employer's reluctance to accept provisions of this nature in the labor contract.<sup>34</sup>

Another option available to employees is arbitration. If a union can establish that a disputed issue, in this case a plant closure, is arbitrable, then it may seek an injunction in court preventing the closure pending arbitration.<sup>35</sup> The most reliable method to ensure that an employer's decision to shut down operations will be considered arbitrable is to obtain a collective bargaining agreement containing language that expressly makes plant closure decisions arbitrable. Even absent such express language, however, the arbitration remedy is not foreclosed, because the

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30. See *infra* notes 35-38 & accompanying text.

31. See *infra* notes 39-47 & accompanying text.

32. For instance, United Shoeworkers, Local 127, had a clause in their contract which stated "it is agreed by the Employer that the shop or factory shall not be removed from the County of Philadelphia during the life of this agreement." Local 127, United Shoeworkers v. Brooks Shoe Mfg. Co., 298 F.2d 277, 280 (3d Cir. 1962). See generally A. LAWRENCE & P. CHOWN, LABOR TRAINING SERIES, PART II, PLANT CLOSINGS AND TECHNOLOGICAL CHANGE: A GUIDE FOR UNION NEGOTIATORS (guide for union negotiators on plant closures, transfers of operations, and technological changes).

33. See, e.g., *Selb Mfg. Co. v. International Ass'n of Machinists*, Div. No. 9, 305 F.2d 177 (8th Cir. 1962) (holding that a contract clause limiting the subcontracting of work will be enforced); Local 127, United Shoeworkers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962) (holding that the employer breached his contract when he moved his business despite a clause in the contract prohibiting such action); *Joseph Schlitz Brewing Co.*, 58 Lab. Arb. (BNA) 653 (1972) (Lande, Arb.) (enforcing a contract clause which limited when layoffs could occur). See generally P. PITEGOFF, PLANT CLOSINGS: LEGAL REMEDIES WHEN JOBS DISAPPEAR 10 (1981); Kay & Griffin, *supra* note 2, at 216.

34. See 2 BUREAU OF NATIONAL AFFAIRS, INC., COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS § 65:3-4 (1983) (only 18% of sample contracts included plant relocation provisions); see also A. LAWRENCE & P. CHOWN, *supra* note 33, at 3-18; P. PITEGOFF, *supra* note 34, at 9-10. It is also possible, but less likely, that courts may interpret the labor contract to contain an implied promise to restrict management discretion about decisions to transfer work or to eliminate positions. See, e.g., *UAW v. Avis Indus. Corp.*, 56 L.R.R.M. (BNA) 2632 (E.D. Mich. 1964) (denying motion for summary judgment because there was a genuine issue of material fact that the employer might have breached his duty of good faith and fair dealing when he shut down a plant although there was no express contract clause prohibiting this action); *Kaiser Steel Corp.*, 44 Lab. Arb. (BNA) 25 (1965) (Bernstein, Arb.) (implying a limit on the contracting out of work in light of other arbitration awards in the steel industry). See generally P. PITEGOFF, *supra* note 33, at 10; Kay & Griffin, *supra* note 2, at 216.

35. See, e.g., *Lever Bros. Co. v. International Chem. Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976).

Supreme Court has established a presumption in favor of arbitration when the parties disagree over the arbitrability of a particular dispute.<sup>36</sup>

Once the decision to close a plant is found arbitrable, the union must still persuade the court that an injunction preserving the status quo during the arbitration process is necessary.<sup>37</sup> This result will probably not be difficult to obtain because the workers should be able to prove irreparable harm from the impact of a closure. Moreover, if the company were allowed to relocate and the arbitrator then decided that the employer is required to negotiate, the union would have an increased burden to convince the company not only that it should not relocate, but also that it should move back to its original location.<sup>38</sup>

The unfair labor practice provisions of the NLRA protect workers who are threatened by a plant closure in two ways. First, section 8(a)(3) of the NLRA<sup>39</sup> forbids discrimination in an employment decision regarding hiring or tenure in order to encourage or discourage union membership. Thus, if an employer decides to close a plant to destroy the incumbent union or to discourage union organizing in that plant or another plant, he has committed an unfair labor practice. For example, in *Textile Workers Union v. Darlington Manufacturing Co.*<sup>40</sup> the United States Supreme Court held that a partial closing of a business was an unfair labor practice in violation of section 8(a)(3) because the employer's decision was "motivated by a purpose to chill unionism in any of the remaining plants of the single employer."<sup>41</sup> The *Darlington* court, however, expressly limited its decision to partial plant closings and noted

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36. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (footnote omitted); see also *Lever Bros.*, 554 F.2d at 119 (relying on *Warrior & Gulf* in holding that a dispute was arbitrable). But cf. *Local 13, Int'l Fed'n of Professional and Technical Eng'rs v. General Electric Co.*, 531 F.2d 1178 (3rd Cir. 1976) (holding that when a dispute over transfer of work was expressly excluded from an arbitration clause, the labor union was not entitled to an injunction preventing the transfer of work).

37. *Lever Bros.*, 554 F.2d at 119-20; *Rochester Indep. Workers, Local No. 1 v. General Dynamics Corp.*, 76 L.R.R.M. (BNA) 2540 (W.D.N.Y. 1970); see P. PITEGOFF, *supra* note 33, at 8-9.

Factors the courts consider in determining whether preliminary injunctions should issue include: 1) Whether the plaintiff has an adequate remedy at law or will be irreparably harmed if the injunction is not issued; 2) whether the threatened harm to the plaintiff if the injunction is denied is greater than the potential harm to the defendant if the injunction is issued; 3) whether the plaintiff has at least a reasonable likelihood of success on the merits; and 4) whether the granting of the injunction will harm the public interest. See, e.g., *O'Conner v. Board of Educ.*, 645 F.2d 578, 580 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981).

38. See *Lever Bros.*, 554 F.2d at 122.

39. 29 U.S.C. § 158(a)(3) (1982).

40. 380 U.S. 263 (1965).

41. *Id.* at 275.

in dictum its view that an employer may close his/her entire business with impunity, even if this decision is based on anti-union animus.<sup>42</sup> Additionally, an earlier court of appeals case, *NLRB v. Rapid Bindery, Inc.*,<sup>43</sup> indicated that as long as anti-union animus is not the employer's primary motivation, the employer can consider his/her relationship with the union even when making a decision to partially close his/her business.<sup>44</sup> Because section 8(a)(3) does not provide any protection if the employer closes the entire business, it is not a remedy amenable to broad application to halt or to delay a plant closure.

Second, under section 8(a)(5) of the NLRA,<sup>45</sup> an employer has a duty to bargain in good faith over wages, hours, or other conditions of employment. Under this section, employees may argue that job security is a fundamental condition of employment and, therefore, that the employer must bargain in good faith before closing a plant. The application of this statute is limited, however, by the Court's holding in *First National Maintenance Corp. v. NLRB*.<sup>46</sup> The United States Supreme Court rejected the argument that the employer must bargain before closing a plant and held that the employer was only required to bargain over the effects of a closure.<sup>47</sup>

The traditional labor law remedies discussed above have limited application as solutions to plant closures. Enforcement of contractual provisions, as well as obtaining injunctions based on the provisions, depends on an ability to negotiate such language into a contract. The NLRA offers effective remedies only for partial closures due to anti-union animus or for a failure to bargain over the effects of a closure. More importantly, the NLRA only protects unionized workers or employees involved in collective bargaining or organizing.

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42. *Id.* at 273-74.

43. 293 F.2d 170, 174-75 (2d Cir. 1961).

44. *Id.* at 175. This decision was not overruled by *Darlington* because in *Darlington* the Supreme Court did not consider whether motives other than anti-union animus were involved in the employer's decision to close part of his business. *See* 380 U.S. at 275.

45. 29 U.S.C. § 158(a)(5) (1982).

46. 452 U.S. 666 (1981).

47. *Id.* at 681-86; *see also* *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). In *Fibreboard* the Supreme Court was confronted with the question of an employer's duty to bargain over the decision to contract out work previously done by members of the collective bargaining unit. The court decided that the employer had violated 29 U.S.C. § 158(a)(5) by failing to negotiate over this decision. The case, while not directly dealing with a plant closure, does illustrate that the Supreme Court will not hesitate to limit an employer's power to make discretionary decisions when the Court considers those decisions to concern terms and conditions of employment. In *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), the National Labor Relations Board (NLRB) imposed a duty on the employer to bargain over a decision to close a plant. The NLRB considered the employer's failure to bargain over this decision a violation of 29 U.S.C. § 158(a)(5). *Ozark Trailers*, 161 N.L.R.B. at 564. As discussed in the text, the Supreme Court has severely limited this duty. *See supra* text accompanying notes 45-47.



## Legal Remedies Outside Labor Law

In addition to the remedies under labor law, employees seeking to halt a plant closure may have a remedy under other legal theories. In *Local 1330, United Steelworkers of America v. United States Steel Corp.*,<sup>48</sup> the union sought to enjoin the closing of a steel mill by claiming breach of contract, promissory estoppel, possession of a right in the nature of an easement, and antitrust violations.<sup>49</sup>

Although the union's request for an injunction was denied, the court's treatment of the claims illustrates that under different factual situations some of these legal theories might be successful in stopping a plant closure. For example, the district court held that the union's claim of promissory estoppel failed for two reasons. First, the union could not have reasonably relied upon the company's promise to keep the plant open.<sup>50</sup> Second, the condition precedent of the promise, that the plant become profitable, was never fulfilled.<sup>51</sup> The breach of contract claim also failed because the condition precedent was not fulfilled and because the corporate officers who made the promise lacked the authority to keep the plant open.<sup>52</sup> The court's opinion implies that the promissory estoppel theory could be successful if an employer's assurances to continue plant operations were so clear that the workers could reasonably rely on them and if either the promise entailed no condition precedent or the condition was fulfilled. Similarly, if a corporate officer had the authority to enter into an agreement with company employees, the court might enforce the contract.

Employees have also brought suits for damages, as opposed to injunctive relief, when a company closes a plant. In California, the non-unionized employees of an Atari plant are currently suing the company in a class action suit.<sup>53</sup> The plaintiffs are seeking damages for the harm caused to them by the defendant's failure to notify them of its decision to relocate the plant at which they had been employed. The Atari employees are claiming, *inter alia*, breach of contract and a breach of the covenant of good faith and fair dealing. The plaintiffs are also claiming

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48. 492 F. Supp. 1 (N.D. Ohio 1980) *aff'd in part and vacated in part*, 631 F.2d 1264 (6th Cir. 1980).

49. 492 F. Supp. at 4-11. All of the union's claims were dismissed by the district court. *Id.* at 11-12. The appellate court affirmed all of the lower court's opinion except its dismissal of the union's antitrust claim. 631 F.2d at 1282-83.

50. 492 F. Supp. at 6.

51. *Id.* at 7.

52. *Id.* at 5-7.

53. *Carson v. Atari, Inc.*, No. 530743 (Super. Ct. Cal., Santa Clara County, second amended complaint filed May 4, 1984); see also Dworkin, *Ex-Atari Workers Sue Over Layoffs*, *San Francisco Chron.*, Aug. 16, 1983, at 2, col. 5; *Atari Ex-Employees Sue, Charging Firm Concealed Layoff Plan*, *Wall St. J.*, Aug. 16, 1983, at 14, col. 3.

several causes of actions based on fraud and misrepresentation of fact.<sup>54</sup>

Another legal strategy that is currently being used to prevent a business relocation or closure is to take over the business through eminent domain proceedings. The City of Oakland, California, has attempted to take over the Raiders' football team franchise, claiming that the takeover would be for a valid public use because it would serve the community's recreational needs.<sup>55</sup> Both workers and communities in Pennsylvania and Massachusetts have considered taking over factories in danger of closing by using eminent domain proceedings. In one case, the threat of such legal action was enough to change the employer's mind.<sup>56</sup> The critical issue, when and if these cases reach the courts, is the extent to which courts will extend the "valid public purpose" requirement of the eminent domain proceeding.<sup>57</sup>

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54. Second Amended Complaint for Damages, *Carson v. Atari, Inc.*, No. 530743 (Super. Ct. Cal., Santa Clara County, filed May 4, 1984).

An important issue in the Atari case is what constitutes reasonable notice. The California Labor Code states that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." CAL. LAB. CODE § 2922 (West Supp. 1984). The Atari plaintiffs must establish how much notice they were due and did not receive in order to prove a violation of this code section.

An EOAA could help them and other victims of plant closures by establishing a legal basis to determine what constitutes reasonable notice. As argued later in this Note, EOAA's would be more effective if they contained notification requirements for plant closures. Proper notice would better equip employees to evaluate, propose, and implement buyout plans. See *infra* notes 161-63 & accompanying text. The amount of notice required under an EOAA could then theoretically be used to determine what reasonable notice is required for the layoffs that result from plant closures.

55. The City of Oakland began eminent domain proceedings to take over the Oakland Raiders football team on February 22, 1980. The city received a temporary restraining order and, later, a preliminary injunction to prevent the team from relocating during trial. *City of Oakland v. Superior Ct.*, 150 Cal. App. 3d 267, 271 (1983). The trial court granted defendant's motion for summary judgment, but the California Supreme Court reversed that decision. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982). The supreme court held that intangible property, like a football franchise, could be acquired by eminent domain and that the city had the right to attempt to demonstrate that its takeover of the Raiders would be for a valid public purpose. *Id.* at 66-72. The court remanded the case for consideration of that issue. *Id.* at 76.

On remand the trial court denied the city's application to reinstate the preliminary injunction. The court of appeal, however, granted the plaintiff's request for a writ of mandate requiring the trial court to hold an evidentiary hearing on the application. *City of Oakland v. Superior Ct.*, 136 Cal. App. 3d 565 (1982). The trial court held the hearing and reinstated the preliminary injunction. See *City of Oakland v. Superior Ct.*, 150 Cal. App. 3d at 271.

The trial on the eminent domain action began on June 30, 1983, and in early August 1983 the trial court's tentative decision to dismiss the action became final. *Id.* at 271-72. In another writ of mandate proceeding, the court of appeal ordered the trial court to vacate its judgment and proceed in accordance with the law of the case established by its own and the supreme court's rulings. *Id.* at 272, 280. To date there has been no final decision in this case.

56. N.Y. Times, June 5, 1984, at A1, col. 6; see Stout, *Eminent Domain and Bank Boycotts*, LAB. RESEARCH REV., Summer 1983, at 12-19.

57. *City of Oakland*, 32 Cal. 3d at 69-73.

In California, workers and labor and community organizations prevented a plant relocation by preventing one city from raiding another's industrial base.<sup>58</sup> The city of Vacaville attempted to use redevelopment funds to provide a company from another community financial assistance to relocate in Vacaville. Through political pressure and legal action, the employee and community groups were able to stop this abuse of public funds. Their strategy is an example of an overall attempt that should be made to keep communities and states from encouraging businesses to relocate in the area at the expense of workers in a previous location.

Creative legal strategies are an essential part of the overall effort to stop plant closures. The litigation based on these new strategies, however, is still in the formative stages, and it is unclear whether it will succeed. Thus, other options must be considered.

### Plant Closing Legislation

Plant closing legislation includes laws that require an employer to give notice to his/her employees or the government that a plant is being closed. Such legislation frequently requires that employers pay severance pay to their employees when the plant is closed. Some legislators have taken the initiative against plant closures by introducing this type of leg-

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58. In early 1983 Simpson Dura-Vent, a chimney pipe manufacturer, announced that it would relocate from Redwood City, California, to Vacaville, California. The company wanted to relocate in order to take advantage of a \$2.5 million dollar offer of tax-exempt loans and other subsidies. These incentives were offered by the Vacaville Redevelopment Agency, which was created pursuant to California Health & Safety Code § 33200 (West 1973 & Supp. 1984). The Redevelopment Agency offered Simpson Dura-Vent these economic incentives using its authority under California's Industrial Development Financing Act. CAL. GOV'T CODE § 91520 (West Supp. 1984). The Redevelopment Agency sought court validation of its authority to provide financing for the company to close its operations in Redwood City and move them to Vacaville.

The Plant Closures Project, an Oakland, California, based organization helping workers and communities stop plant closures or mitigate their effects, joined with the United Electrical, Radio, and Machine, Local 1412 (UE), the union representing the workers at Simpson Dura-Vent's Redwood City plant, and two named individuals who would have been affected by the relocation to oppose the validation. They filed an opposition to the Redevelopment Agency's complaint, claiming that the proposed financing was unlawful under a California statute prohibiting public entity financing of plant closings in one part of the state and relocation to another.

On July 12, 1983, the Redevelopment Agency signed an agreement with the Plant Closures Project and the UE to drop its request for validation and to withdraw its offers of assistance to Simpson Dura-Vent. The city also agreed to require any other businesses receiving redevelopment loans to adopt an affirmative action plan, to give continued recognition to any union that represented its workers prior to relocation, and to provide at least one year advance notice of plans to reduce or cease operations in its prior location. The City of Vacaville has passed an ordinance incorporating these requirements. Answer and Opposition to Complaint for Validation, *Vacaville Redevelopment Agency v. Garcia*, No. 84213 (Super. Ct. Cal., Solano County); Shorrock, *California City Passes Landmark Plant Closure Bill*, 5 MULTINATIONAL MONITOR 4 (1984).

islation in various state legislatures and in the United States Congress.<sup>59</sup> The enactment of plant closing legislation, however, has been extremely difficult and often impossible.<sup>60</sup>

Plant closing legislation requiring notice and severance pay currently exists in only two states: Maine and Wisconsin. The Maine law requires that employers give notice and provide severance pay to their employees in certain plant closing situations.<sup>61</sup> In Wisconsin an employer of one hundred or more employees is required to give sixty days notice to the state's Department of Industry, Labor, and Human Relations in the event of "relocation or cessation of business."<sup>62</sup> Other states have recently passed legislation addressing the plant closure problem, but that legislation does not require notice or severance pay.<sup>63</sup>

In addition, the cities of Pittsburgh and Philadelphia have enacted ordinances requiring notice of plant closures.<sup>64</sup> The Pittsburgh ordinance, however, was recently declared unlawful because it violated the city's Home Rule Charter and invaded the primary jurisdiction of the NLRB.<sup>65</sup>

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59. See, e.g., H.R. 379, H.R. 807, H.R. 2827, H.R. 4031, 98th Cong., 1st Sess. (1983); H.R. 565, 97th Cong., 1st Sess. (1981); H.R. 7315, 96th Cong., 2d Sess. (1980); Alaska H.R. 274, 11th Leg., 2d Sess. (1980).

Representative William Ford, democrat from Michigan, has sponsored many of the congressional bills, including this year's H.R. 2847, the National Employment Practices Act. Speaking recently at a national conference on economic dislocation and job loss, Representative Ford was pessimistic about the possibility that H.R. 2847 would be enacted. He said that election concerns would prevent this Act and other worthwhile legislation from passing. *Michigan Congressman on Plant Closing Bill*, 115 LAB. REL. REP. (BNA) 306 (April 16, 1984). See generally Note, *Advance Notice of Plant Closings: Toward National Legislation*, 14 U. MICH. J.L. REF. 283 (1981).

60. Note, *supra* note 59, at 283-84; see also Kay & Griffin, *supra* note 2, at 209-15; Wall St. J., June 26, 1984, at 27, col. 1; letter from New York State Senator Walter J. Floss, Chairman Standing Committee on Commerce and Economic Development to Author (Oct. 25, 1983) (discussing a New York plant closing bill and its limited chances for successful passage) (copy on file with the *Hastings Law Journal*) [hereinafter cited as Floss Letter].

61. "Any person proposing to relocate a covered establishment outside the state shall notify employees, and the municipal officers of the municipality where the plant is located, in writing not less than 60 days prior to the relocation." ME. REV. STAT. ANN. tit. 26, § 625-B(6-A) (Supp. 1983).

62. WIS. STAT. ANN. § 109.07 (West Supp. 1983).

63. See, e.g., ALA. CODE § 25-3-5 (Supp. 1983) (authorizing the Commissioner of Labor to assist employees out of work because of plant or industry closures); CONN. GEN. STAT. ANN. § 32-9p(b) (West Supp. 1984) (authorizing tax benefits to communities suffering from plant closures by including communities suffering from a major plant closing, relocation, or layoff within the definition of "distressed community").

64. Pittsburgh, Pa., Ordinance 21 (1983); Philadelphia, Pa., Ordinance No. 1118 (June 17, 1983).

65. *Smaller Manufacturers Council v. City Council of Pittsburgh*, No. 6D 83-11245, (Ct. C.P. Pa., Allegheny County, declaratory judgment entered August 19, 1983). This decision has not been appealed. Letter from D.R. Pellegrini, City Solicitor, Department of Law, City of Pittsburgh to Author (Oct. 11, 1984) (discussing the ordinance and court proceedings).

Plant closing legislation is a strong, but controversial, response to plant shutdowns and relocations. Currently, however, the majority of American workers cannot consider it a viable solution because so few state and local governments provide this type of legislation.

### *Summary*

Plant closings are difficult, though not impossible, to prevent given the current state of the law. Labor law provides limited remedies, the application of other legal theories is uncertain, and in most states plant closing legislation is unavailable. Workers, communities, and unions are left largely to their own devices to deal with a closure. One way they have faced this challenge is to buy the plant from their employer.

Employee buyouts involve complicated issues. For instance, employees must be able to determine whether the business will be economically viable. They must also decide how to finance the buyout and what form their ownership will take. Most importantly, they must be aware of the possibility of a buyout and may need assistance in confronting legal, economic, and political problems likely to arise during the buyout process. Legislation has been passed in a few states to help employees buy out plants in danger of closing. The remainder of this Note will examine some of the issues faced by employees in a buyout effort and analyze the legislation to determine its effectiveness in promoting buyouts.

## **Overview Of Employee Ownership Structures And Current Legislation**

There are two types of employee ownership: worker cooperatives and employee stock ownership plans (ESOPs).<sup>66</sup> Worker cooperatives are structured to provide for democratic control by the workers. A cooperative is owned and controlled directly by the workers. Each worker is a member of the cooperative, and each member owns one share of and has one vote in the cooperative.<sup>67</sup> The basic principle of cooperatives is that membership rights, which consist of voting rights and rights to net earnings, are personal rights that attach to the status of employee of the company.<sup>68</sup>

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(copy on file with the *Hastings Law Journal*). The Philadelphia ordinance is still in effect. Letter from Claudia Becker, Assistant City Solicitor of Philadelphia to Author (Nov. 19, 1984) (discussing Philadelphia's plant closing ordinance).

66. See NATIONAL CENTER FOR EMPLOYEE OWNERSHIP & THE CONFERENCE ON ALTERNATIVE STATE AND LOCAL POLICIES, *EMPLOYEE OWNERSHIP: ISSUES, RESOURCES AND LEGISLATION* 2 (1982) [hereinafter cited as *EMPLOYEE OWNERSHIP*]; Pitegoff, *Worker Ownership: Is it a Strategy for Labor?*, LAB. UPDATE, July-Aug. 1982, at 9.

67. Pitegoff, *supra* note 66, at 10.

68. *Id.*; *EMPLOYEE OWNERSHIP*, *supra* note 66, at 3.

There are new types of worker cooperatives which have been structured to solve the problems encountered by past worker cooperatives. All cooperatives allow members to own

Although worker cooperatives are not uncommon,<sup>69</sup> ESOPs are the more prevalent arrangement.<sup>70</sup> ESOPs are defined in the federal Employee Retirement Income Security Act (ERISA),<sup>71</sup> and ERISA's definition is generally incorporated into state legislation on employee ownership.<sup>72</sup> There are essentially three types of ESOPs:<sup>73</sup> leveraged,<sup>74</sup> non-leveraged,<sup>75</sup> and tax-credit.<sup>76</sup> The leveraged ESOP is used most often in an employee buyout.<sup>77</sup> The statutory requirements for an ESOP are complex. For example, the plan must meet certain tax and security regulations.<sup>78</sup> However, ESOPs are flexible and can be designed to establish different financing and ownership arrangements.

only one share. Each share has one vote, and each member has the right to a job in the cooperative. Traditional cooperatives have encountered problems when the cooperative becomes successful and the value of shares rises. Eventually, the price of shares becomes so high that no one can afford to buy one, and thus new members are unable to join. This becomes a problem as older employees want to leave the company and sell their shares. In response to this situation, alternative cooperative models have been formulated. The Mondragon cooperatives were developed in Spain and have been very successful. Under this model, share prices do not increase. Instead, the cooperative's net earnings are distributed into each member's account and may be collected by the member upon leaving the cooperative. *EMPLOYEE OWNERSHIP*, *supra* note 66, at 15-17.

69. *EMPLOYEE OWNERSHIP*, *supra* note 66, at 15.

70. *Id.* at 3.

71. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, & 42 U.S.C.) [hereinafter cited as ERISA].

26 U.S.C. § 4975(e)(7) (1982) states:

The term "employee stock ownership plan" means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of § 409A(h) and, if the employer has a registration-type class of securities (as defined in § 409(e)(4)), it meets the requirements of § 409A(e).

72. *See infra* note 100.

73. All ESOPs are considered to be a category of deferred employee contribution plans. Essentially the employer establishes a trust in which each employee then makes contributions to the trust which benefit the employer and employees in different ways depending on the type of ESOP established. Marsh & McAllister, *ESOP's Tables: A Survey of Companies with Employee Stock Ownership Plans*, 6 J. CORP. L. 551, 554-55 (1981).

74. In a leveraged ESOP the employer guarantees any loans the trust borrows from banks. The trust then uses the loan to buy shares of the employer's company. *Id.* at 556.

75. Non-leveraged ESOPs are not designed to obtain loans because the employer does not guarantee the loan. *Id.* at 557-58.

76. An employer makes contributions to a tax credit ESOP for which the employer gets an investment tax credit. *Id.* at 557-58. Recently the form for a tax-credit ESOP contribution has been changed. Rather than receiving a tax-credit for a qualified investment, the employer receives a credit based on a percentage of the payroll. *See* NEW JERSEY DEPARTMENT OF LABOR, *EMPLOYEE STOCK OWNERSHIP PLANS: A PROGRAM FOR NEW JERSEY* 16 (1982).

77. *See* *EMPLOYEE OWNERSHIP*, *supra* note 66, at 13.

78. 26 U.S.C. §§ 401(2), 4975(e), (f) (1982).

Unlike a cooperative, employee shares of the company's stock in an ESOP are held by a trust, and the statutes do not always require that the participants have full voting rights.<sup>79</sup> As a result, an ESOP can be less democratic than a worker cooperative and does not guarantee worker control.<sup>80</sup>

Legislation encouraging employee ownership is not always designed to support both the worker cooperative and the ESOP models of ownership. Broadened ownership assistance acts (BOAAs) are concerned only with broadening the base of capital ownership through ESOPs.<sup>81</sup> They do not offer incentives or guidelines for dispersing the ownership of capital through cooperatives.<sup>82</sup> EOAA's, on the other hand, generally do not distinguish between these models of employee ownership. They encourage employee buyouts through either cooperatives or ESOPs in the event of a plant closure.<sup>83</sup> As the following discussion indicates, BOAAs differ from EOAA's in other ways. As a result, they are not as useful in buyouts attempted to prevent plant closures.

### Broadened Ownership Assistance Acts

BOAAs rest on a theoretical foundation developed by Louis Kelso.<sup>84</sup> Kelso maintained "that a broader distribution of the ownership of productive wealth . . . would help to remedy many of the problems that plagued the United States economy."<sup>85</sup> He promoted ESOPs as a way to achieve this goal.<sup>86</sup> The federal government was the first to enact legislation encouraging employee ownership through ESOPs.<sup>87</sup> Congress has introduced legislation that encourages the use of ESOPs and improves their structure.<sup>88</sup>

More recently, several states have enacted BOAAs. In some states

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79. Marsh & McAllister, *supra* note 73, at 571; *see also* EMPLOYEE OWNERSHIP, *supra* note 66, at 12.

80. Lewin, *Worker Held Enterprises*, N.Y. Times, Apr. 17, 1984, at D2, col. 1; Minsky, *Gripes of Rath*, Wall St. J., Dec. 2, 1981, at 1, col. 6.

81. *See infra* notes 84-92 & accompanying text.

82. *Id.*

83. *See infra* notes 93-100 & accompanying text.

84. L. KELSO & M. ADLER, *THE CAPITALIST MANIFESTO* (1958); *see also* Marsh & McAllister, *supra* note 73, at 558.

85. Marsh & McAllister, *supra* note 73, at 558.

86. *Id.* at 558-60.

87. Although not expressly excluded, the federal and state legislation which is based on Kelso's broadened ownership ideas does not support worker cooperatives.

88. *E.g.*, Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 13, 19, 26, 28, & 31 U.S.C.); Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 5, 8, 26, 29, 31 & 42 U.S.C.); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified in scattered sections of 31 & 45 U.S.C.). *See generally* Marsh & McAllister, *supra* note 73, at 560-63.

the statute simply declares the state's policy to broaden the base of capital ownership by encouraging the use of ESOPs.<sup>89</sup> In addition to these policy statements, some states have passed legislation supporting broadened ownership through securities law reforms<sup>90</sup> and tax law reforms.<sup>91</sup> These laws, through their policy statements as well as their relaxed securities and tax requirements, encourage employers to offer ESOPs to their employees. They do not necessarily encourage employees to utilize an ESOP in order to buy out a plant in danger of closing.

BOAAs do not specifically address plant closures and do not provide state assistance or resources to employees interested in employee ownership. Rather, they encourage employers to offer ESOPs to their employees through policy statements and/or relaxed security and tax regulations. By the time EOAs were enacted, federal legislation supporting employee ownership was already in effect.<sup>92</sup> EOAs have expanded the ownership principles embodied in both BOAAs and federal legislation by adapting them to the plant closure situation. BOAAs, however, can be useful in an employee buyout to prevent a shutdown by offering tax advantages and relaxed security regulations to employee owned businesses.

#### Employee Ownership Assistance Acts

EOAs have been passed in California,<sup>93</sup> Illinois,<sup>94</sup> Michigan,<sup>95</sup> and

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89. "It is the policy of this state to encourage the broadening of the base of capital ownership among wider numbers of Delaware citizens, and to encourage the use of employee stock ownership as 1 means of broadening the ownership capital." DEL. CODE ANN. tit. 29, § 6508(c) (Supp. 1984).

"[B]roadening the ownership of capital should be a twin pillar of economic policy, along with achieving full employment . . . [E]mployee stock ownership plans . . . make an important contribution toward the broadening of capital ownership . . . ." MD. ANN. CODE art. 41, § 14J(a) (1982).

90. MD. CORPS. & ASS'NS CODE ANN. § 11-602(14) (Supp. 1983) (This statute exempts the sale of securities to an employee stock ownership plan trust from the regulations of §§ 11-205 and 11-501. These sections require, among other things, the filing of advertisements intended for distribution to particular buyers and the registering of securities.).

91. Act of Dec. 31, 1982, ch. 15, 1983 Minn. Sess. Law Serv. 92 (West) (codified at MINN. STAT. ANN. § 290.26(2) (West Supp. 1984)) (allowing a tax deduction for employer contributions to an employee's trust, annuity plan, or stock ownership trust).

92. See *supra* notes 87-88 & accompanying text; *infra* notes 93-96 & accompanying text.

93. Employee Ownership Assistance Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West) (codified at CAL. GOV'T CODE § 91502.1(b)(3); scattered sections of CAL. UNEMP. INS. CODE (West Supp. 1984)).

94. Employer Ownership Assistance Act, Pub. Act No. 82-991, 1982 Ill. Legis. Serv. 2584 (West) (codified at ILL. ANN. STAT. ch. 48, §§ 1301-1313 (Smith-Hurd Supp. 1983)).

95. Act of July 2, 1979, Pub. Act No. 44, 1979 Mich. Pub. Acts 62 (codified at MICH. COMP. LAWS ANN. § 450.751-.759 (Supp. 1983)) (lapsed 1984). This statute was enacted in 1979 and lapsed in July, 1984, pursuant to its sunset provision. A bill to replace and expand the lapsed statute is currently pending in the Michigan legislature. See *supra* note 18.



New York.<sup>96</sup> In contrast to BOAAs, EOAs are specifically designed to address plant closures. For instance, the purpose of Illinois' EOAA is:

[T]o encourage the employees of plants that are about to be permanently closed, or be relocated, to acquire such plants, with the consent of their owners, and to continue to operate them as employee-owned enterprises, thereby retaining the jobs that would otherwise be lost, and strengthening the economic base of this State.<sup>97</sup>

EOAs may include the cooperative as a viable employee ownership model,<sup>98</sup> although, practically speaking, they more readily facilitate ESOPs.<sup>99</sup> Like BOAAs, EOAs address the issue of control under an employee ownership plan, if at all, only to the extent that federal law does.<sup>100</sup>

Unlike plant closing legislation, EOAs have been enacted with relative ease.<sup>101</sup> In all of the states that currently have EOAs, the attempts to pass plant closing legislation have failed.<sup>102</sup> EOAs differ from plant closing legislation because they do not directly regulate plant closures. Plant closure legislation essentially places conditions on an employer's decision to close a plant by requiring him to give the employees notice of the closure or to give them severance pay after the closure. In contrast, EOAs propose employee buyouts as a response to a closure, but do not directly affect the employer's decision to close a plant. For this reason, EOAs may be seen as an attractive alternative to the enactment of controversial plant closing legislation.<sup>103</sup>

A determination of the effectiveness of EOAs as an alternative to plant closure legislation requires an understanding of the basic provisions of EOAs.

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96. Act of July 30, 1983, ch. 788, 1983 N.Y. Laws 1478 (codified at N.Y. PUB. AUTH. LAW §§ 1801(11)(a), (14) 1836(a)-(g) (McKinney Supp. 1983)).

97. ILL. ANN. STAT. ch. 48, § 1302 (Smith-Hurd Supp. 1983).

98. See, e.g., MICH. COMP. LAWS ANN. § 450.751(c) (Supp. 1983) (lapsed July, 1984).

99. For instance, EOAs often give preference to employees who receive a substantial portion of their buyout funding from outside and/or private sources when determining eligibility for state funds. ILL. ANN. STAT. ch. 48, § 1306 (Smith-Hurd Supp. 1983); N.Y. PUB. AUTH. LAW § 1836d (McKinney Supp. 1983). Since the banking community may generally be less willing to lend to cooperatives than to more traditional ESOPs, this requirement may effectively force employees to adopt an ESOP model of ownership.

100. See, e.g., CAL. GOV'T CODE § 91502.1(c)(1) (West Supp. 1984) (This statute gives ESOP employees voting rights in accordance with 26 U.S.C. § 409A(e) (1982). 26 U.S.C. § 409A(e) regulates voting rights on registration and non-registration type securities, but does not address how the internal operation of an employee owned company should be regulated.); see also N.Y. PUB. AUTH. LAW § 1836(b)(5) (McKinney Supp. 1983) (employees must control majority of voting stock, or, if held in trust, employees must elect trustees).

101. See Conference on Alternative State and Local Policies, Legislative Brief, Worker Ownership Assistance for Labor and Citizen Groups in Michigan: HB 4119, at 3 (June 24, 1981) (copy on file with the *Hastings Law Journal*) [hereinafter cited as Legislative Brief].

102. Note, *supra* note 59, at 283-84.

103. Legislative Brief, *supra* note 101, at 3.

## Analysis and Comparison of EOAA's in Illinois, New York, and Michigan<sup>104</sup>

All EOAA's include provisions relating to financing and administration, but there are differences in what each state has provided in these areas. The following discussion will lay out the different provisions each state has enacted.

### Administration

The EOAA's in Illinois, New York, and Michigan all give an existing department in the state government the responsibility of encouraging employee ownership.<sup>105</sup> In Illinois, the Department of Commerce and Community Affairs is authorized to assist employee owned enterprises by: Fostering the employee-owned enterprise's relationship with federal, state, and local government; conducting research and educational programs; obtaining managerial, technical, and financial assistance; and simplifying licensing and application procedures whenever possible.<sup>106</sup> In addition, the Illinois statute establishes an employee-

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104. In 1981 New Jersey passed a Worker Owned Corporation Study Act which directed the Department of Labor and Industry to conduct a study concerning ESOPs and, pursuant to its findings, to develop a plan to encourage the formation of ESOPs. The goal of this Act was to make it a high priority of the relevant state agencies to help workers save jobs by forming ESOPs. N.J. STAT. ANN. §§ 34:1B-30 to 1B-35 (West Supp. 1984).

According to the plan developed by the Department, a bill has been introduced in both the New Jersey Senate and Assembly entitled the Employee Stock Ownership Plan Act. Similar to EOAA's, the bill's purpose is to avert plant closures. However, it is limited to assisting the formation of ESOPs and is primarily focused on regulating and defining their operation. A. 3325, 201st Leg., 1st Sess.; S. 3174, 102d Leg., 1st Sess. Unlike the legislative history in Illinois, Michigan, New York and California, these bills have met with some resistance. The governor has vetoed the Assembly Bill largely because of his opposition to the tax exemption provisions in the bill. Letter from Governor Thomas H. Kean to General Assembly (Sept. 6, 1983) (discussing his veto).

Recently the New Jersey Legislature, using the findings of the study, did enact a statute which encourages employee ownership. Employee Stock Ownership Plan Act, ch. 471, 1983 N.J. Sess. Law Serv. 2654 (West) (codified at N.J. STAT. ANN. § 52.27H-90 (West Supp. 1984)). The enacted statute recognizes that employee stock ownership plans offer a mechanism for the retention of jobs which would be lost through plant closures. The statute declares that it is in the public interest to assist employee stock ownership plans. This statute specifically mentions the findings of the study and includes language from the report which warns that "great care should be taken to avoid the waste of public and private resources and the bitter disappointment of the employees that might result from the employee acquisition of an obsolete, overpriced or otherwise undesirable facility." N.J. STAT. ANN. § 52.27H-90(d) (West Supp. 1984).

105. ILL. ANN. STAT. ch. 48, § 1304 (Smith-Hurd Supp. 1983); MICH. COMP. LAWS ANN. §§ 450.752-753 (West Supp. 1983); N.Y. COM. LAW § 104a (McKinney Supp. 1983).

106. The statute states that the Department is authorized to assist and counsel new employee-owned enterprises, in their dealings with federal, state and local governments, receive complaints and suggestions concerning policies and activities of federal, state and local governmental agencies which affect em-

owned enterprise advisory council to instruct both employee-owned businesses and the Department about the issues concerning employee ownership. The Council also reviews and approves loans to employee-owned enterprises.<sup>107</sup>

In New York the Department of Commerce has the responsibility for encouraging employee ownership. The Department's duties are similar to those of the Illinois Department of Commerce. New York's statute, however, also gives its Department the authority to "[i]dentify industrial and manufacturing businesses that are in danger of being permanently closed or relocated out of state . . . and [to] assist the businesses and employees of such businesses by distributing information about the provisions of this section."<sup>108</sup>

Michigan's Department of Labor, in cooperation with the state's Department of Commerce,<sup>109</sup> was also authorized to take an active role during an employee buyout. Besides serving as an information source for individuals and organizations interested in a buyout, the Department could evaluate the feasibility of a proposed employee-owned corporation. The Department also could provide technical assistance, counseling services, and training during a buyout effort and during the operation of an employee-owned corporation. In addition, the Department could facilitate the efforts of local, state, federal, and private agencies to assist employee ownership and could recommend legislative or executive action to enhance opportunities for employee ownership.<sup>110</sup>

### Financing

Another feature of EOAA is a provision for the financing of employee-owned businesses. Illinois' EOAA contains the most liberal fund-

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ployee-owned enterprises, conduct investigations, research, studies and analysis of matters affecting the interests of employee-owned enterprises, assist employee-owned enterprises in obtaining available managerial, technical and financial assistance, initiate and encourage educational programs relating to employee-owned enterprises and help new employee-owned enterprises in Illinois by simplifying and streamlining license and application procedures wherever possible.

ILL. ANN. STAT. ch. 48, § 1304 (Smith-Hurd Supp. 1983).

107. *Id.* § 1305.

108. N.Y. COM. LAW § 104-a (McKinney Supp. 1983). This section also allows the department to impose fees to defray departmental expenses incurred in the execution of its duties. *Id.*

109. The original bill referred only to the Department of Labor. The amended bill, however, assured the participation of the Department of Commerce. Michigan Department of Commerce, Analysis of Sub House Bill 4119 (H-2) (May 30, 1979) (unpublished memorandum) (copy on file with the *Hastings Law Journal*).

110. MICH. COMP. LAWS ANN. § 450.753 (West Supp. 1983) (lapsed July, 1984). Section 450.756 gave the Department power to hold meetings of interested parties and conduct an initial feasibility study if the Department became aware that a business was closing. The Department could also have been made aware of a closure under Michigan's voluntary notification provision.

ing assistance provisions. The Illinois statute authorizes its Industrial Development Authority to loan money to employee ownership associations, but only with Advisory Council and authority approval.<sup>111</sup> In addition, the Illinois statute sets standards and restrictions for granting the loans, including a requirement for a minimum of fifty percent outside financing.<sup>112</sup>

New York's EOAA empowers the Job Development Authority to enter into a loan agreement with an employee ownership association if the authority approves the loan.<sup>113</sup> The Act also establishes application and loan requirements, including at least sixty percent outside funding, reasonable assurance of repayment, and fairly restrictive loan preference standards.<sup>114</sup>

Michigan provided the least coverage in this area, authorizing nothing more than Department of Labor assistance in obtaining financing.<sup>115</sup>

#### Additional Provisions of the Michigan EOAA

The Michigan EOAA, in addition to containing administrative and financing provisions similar to those of the New York and Illinois EOAA's, had two unique features. First, the Michigan statute encouraged businesses to give the Department timely notice about a decision to close or relocate.<sup>116</sup> Second, the Act required that the Department give the legislature a yearly report listing the number of individuals and establishments helped or likely to be helped by the Department and a biennial report "describing the effectiveness of the act in maintaining employment within the state."<sup>117</sup>

### California's EOAA

In September 1983<sup>118</sup> California enacted an EOAA which, although

111. ILL. ANN. STAT. ch. 48, § 1309(a) (Smith-Hurd Supp. 1983).

112. ILL. ANN. STAT. ch. 48, § 1308(1) (Smith-Hurd Supp. 1983). There is a bill currently before the Illinois General Assembly which would remove financing percentage requirements entirely. Preference would still be given to projects with higher outside funding percentages. A. 364, 83d Leg., Reg. Sess. (1984).

113. N.Y. PUB. AUTH. LAW § 1801(11)(a) (McKinney Supp. 1983).

114. N.Y. PUB. AUTH. LAW §§ 1836-c, 1836-d, 1836-e(2), (3) (McKinney Supp. 1983).

115. MICH. COMP. LAWS ANN. § 450.753(e) (West Supp. 1983) (lapsed July, 1984).

There was, however, an attempt made to amend the Act to include funding for feasibility analysis, market studies, and ESOP development. Letter from James Houck, Section Chief, Community Development and Technical Assistance Section, Office of Industrial Training, Michigan Department of Labor to Author (Sept. 27, 1983) (discussing Michigan's EOAA) (copy on file with the *Hastings Law Journal*) [hereinafter cited as Houck Letter].

116. MICH. COMP. LAWS ANN. § 450.755 (West Supp. 1983) (lapsed July, 1984).

117. MICH. COMP. LAWS ANN. §§ 450.757-.758 (West Supp. 1983).

118. Employee Ownership Assistance Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West) (codified at CAL. GOV'T CODE § 91502.1(b)(3); scattered sections of CAL. UNEMP. INS. CODE (West Supp. 1984)).

amended several times after its introduction, met with no major opposition.<sup>119</sup>

Like EOAA's in other states, the California EOAA contains provisions for financing arrangements and allocates responsibility for promoting employee ownership to a state agency, the Department of Economic and Business Development (DEBD).<sup>120</sup> The DEBD is responsible for "assisting employees of a business or place of work in the formation of an employee-owned corporation . . . by providing technical assistance, information, or access to sources of financing."<sup>121</sup> In addition, the Office of Local Economic Development<sup>122</sup> is required to "[c]ooperate with state and federal agencies in making grants or loans to . . . employee-owned corporations . . . for the purpose of establishing or expanding local economic development projects which will increase employment opportunities."<sup>123</sup>

The Act has specific, although limited, provisions that include authorization for the issuance of revenue bonds. The state may issue bonds to aid "[t]he transfer of ownership of a business . . . which has closed or is in danger of closing, to its employees for the purpose of formation of an employee-owned corporation" if consumer benefits will result from the transfer.<sup>124</sup>

The Act adds several sections to California's Unemployment Insurance Code.<sup>125</sup> One section mandates that the coordination and special services plan of the State Job Training Council,<sup>126</sup> which administers money available from the federal Job Training Partnership Act,<sup>127</sup> facilitate employee ownership.<sup>128</sup> In another section, the Employment Development Department<sup>129</sup> is directed to administer reemployment assistance funds for displaced workers.<sup>130</sup> Finally, the state indirectly provides some

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119. Interview with Leonard Goldberg, Legislative Aide to Assemblyman Tom Bates (Sept., 1983) [hereinafter cited as Goldberg Interview].

120. CAL. GOV'T CODE § 15330 (West Supp. 1984).

121. CAL. GOV'T CODE § 15330(f) (West Supp. 1984).

122. The Office of Local Economic Development is one of the four divisions of the Department of Economic and Business Development (DEBD). CAL. GOV'T CODE § 15325 (West Supp. 1984). The DEBD is the state agency responsible for overseeing the economic development of California. CAL. GOV'T CODE § 15330 (West Supp. 1984).

123. CAL. GOV'T CODE § 15332(b) (West Supp. 1984).

124. CAL. GOV'T CODE § 91502.1(b)(3)(C) (West Supp. 1984).

125. CAL. UNEMP. INS. CODE § 10527 (West Supp. 1984).

126. Establishment of a state job training coordinating council is required by 29 U.S.C. § 1532 (1982) in order for the state to receive financial assistance under the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 (1982) (codified at scattered sections of 18 & 29 U.S.C.).

127. Pub. L. No. 97-300, §§ 121-127, 96 Stat. 1322, 1337-43 (1982) (codified at 29 U.S.C. §§ 1531-1537 (1982)).

128. CAL. UNEMP. INS. CODE § 10527 (West Supp. 1984).

129. CAL. UNEMP. INS. CODE § 301 (West Supp. 1984).

130. CAL. UNEMP. INS. CODE § 15086(f) (West Supp. 1984).

financial support for the employee ownership effort by permitting persons engaged in a buyout to collect unemployment compensation benefits.<sup>131</sup>

The most controversial section of the Act was a provision for a tax credit for a company which, seeking to sell its assets to its employees, contributed to the cost of the feasibility study and donated "land, buildings, [or] other non-moveable equipment and stationary assets" to an employee-owned corporation.<sup>132</sup> Because this provision was rejected in the enacted Bill,<sup>133</sup> employees interested in employee ownership may find it more difficult to obtain funding for preliminary feasibility studies. Private funding for preliminary feasibility studies can be difficult to obtain because neither the lender nor the borrower knows whether the buyout will be successful. Once a preliminary positive evaluation of the business' chance for success has been made, however, private funding for more in-depth studies is more easily obtained.<sup>134</sup>

Another major provision that was deleted from the final version of the Act was an amendment exempting the purchase of an employee-owned corporation's stock from section 25110 of the California Corporation Code.<sup>135</sup> Section 25110 requires that all securities sales meet the qualifications of California Corporation Code sections 25111, 25112, or 25113, including the provisions of those sections for notification and for the issuance of a permit.<sup>136</sup> Representatives of the California Department of Corporations opposed this provision because they believed there was no basis for the exemption.<sup>137</sup> The Department reasoned that a public purpose would be served by retaining the review and qualification requirements provided for under general securities law.<sup>138</sup> The compro-

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131. CAL. UNEMP. INS. CODE § 1253 (West Supp. 1984).

132. A. 1728, § 7, 1983-1984 Cal. Leg., Reg. Sess.. The opposition was apparently based on an administrative aversion to tax credits. Goldberg Interview, *supra* note 119.

133. See Employee Ownership Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West).

134. Interview with Catherine Squire, Staff Member, Department of Economic and Business Development and Regional Director, National Center for Employee Ownership (Sept., 1983) [hereinafter cited as Squire Interview].

135. Section 25110 makes it "unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified under sections 25111, 25112 or 25113." CAL. CORP. CODE §§ 25110-25113 (West 1977 & Supp. 1984). Compare A. 1728, § 4(n), 1983-1984 Cal. Leg., Reg. Sess. with Employee Ownership Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West).

136. CAL. CORP. CODE §§ 25111-25113 (West 1977 & Supp. 1984).

137. Letter from William Kenefick, Legislative Coordinator and Senior Corporation Counsel, California Department of Corporations to Assemblyman Tom Bates (May 25, 1983) (discussing the Department of Corporations' opposition to the original version of A.B. 1728) (copy on file with the *Hastings Law Journal*) [hereinafter cited as Kenefick Letter].

138. The Department also believed that the simple disclosure of risks required under the amendment did not adequately replace the merit standard approach of the current law. The provision had required that when stock was sold to employees, they be provided with clear information about the risks and responsibilities of their purchase. Current law provides that

mise that was enacted requires that ESOPs file with the Department of Corporations, but mandates that the Department "shall develop an expedited procedure for the review of an application for authority to sell securities to an employee-owned corporation."<sup>139</sup>

### Analysis Of EOAs

There are two essential questions that must be addressed when analyzing EOAs. First, the Acts must be evaluated to determine whether they are effectively designed to reach their expressed goals. Second, they must be examined to determine how they fit into an overall scheme to deal with plant closures. Evaluation of EOAs is facilitated by analyzing how they are structured and operate in different states. This Note will focus on the California and Michigan statutes for comparison purposes.<sup>140</sup>

The goals of EOAs are to encourage employee ownership by helping workers buy their workplaces in the event of a plant closure and thereby to strengthen the economic base of their communities.<sup>141</sup> To achieve these goals, legislators need to ask what will make employee buyouts and ownership successful. The National Center for Employee Ownership has identified several factors necessary for success: mobilization of the employees and community, including active participation from any union at the plant; a viable firm; technical assistance, especially from current owners, management and government; a viable organizational structure for the employee-owned enterprise, including a recognition that employees often expect increased participation; and time "to pull all the pieces together before the plant closes."<sup>142</sup> Adequate funding for the buyout and subsequent business operation is another highly significant factor.<sup>143</sup>

EOAs do contain provisions that address some of these success factors. For example, all EOAs currently in effect provide some type of state financial assistance.<sup>144</sup> Lack of financing has been identified as one

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the Commissioner of the Department of Corporations may refuse to issue a permit for the issuance of securities if the Commissioner finds that such an issuance is not fair, just, and equitable, that the applicant might commit fraud, or that the applicant does not conduct his/her business honestly. CAL. CORP. CODE § 25140 (West 1977); Kenefick Letter, *supra* note 138.

139. Employee Ownership Act of 1983, ch. 998, § 10, 1983 Cal. Legis. Serv. 5347 (West).

140. Though the Michigan EOAA has lapsed pursuant to its sunset provision, *see supra* note 18, it provides one of the better models for comparison, in part because it was in existence longer than any other EOAA has been.

141. For a clear statement of an express goal of EOAs, *see supra* note 97 & accompanying text.

142. C. SQUIRE, *supra* note 3, at 17-26.

143. L. WINTNER *supra* note 13, at 4; EMPLOYEE OWNERSHIP, *supra* note 66, at 22.

144. *See supra* notes 111-15, 120-31 & accompanying text.

of the major reasons why Michigan's EOAA was not more successful.<sup>145</sup>

A fundamental flaw in California's EOAA is that funding for the implementation of employee ownership is largely discretionary.<sup>146</sup> California's strategy is to identify existing government funding programs in which support for employee ownership is a legitimate use of the funds.<sup>147</sup> The California State Job Training Council, for example, is directed to facilitate employee ownership.<sup>148</sup> Although this could include using part of the discretionary funds from the Job Training Partnership Act to assist buyouts, that strategy is not expressly mandated by the Act. Therefore, the Council's willingness to allocate funds to support employee ownership depends on whether the Council concludes that economic development as well as job retraining is one of its goals. If the Council limits its role to retraining workers displaced by a plant closure, it will not provide much assistance to workers who decide to buy the business instead of finding new jobs.<sup>149</sup>

In addition, the California law only requires the DEBD to encourage employee ownership if private funds are available or if state funds are specifically allocated by the legislature for this purpose.<sup>150</sup> Thus, the Act does not guarantee that the DEBD will establish programs or make other efforts to assist employee ownership.

An additional shortcoming of the California Act is that it does not include a provision encouraging the use of feasibility studies.<sup>151</sup> Such studies, however, are vital to ensure that a business is both economically and organizationally viable.<sup>152</sup> Without a feasibility study, financial and technical assistance might be provided to businesses that are likely to fail. This result would waste government money and do little to strengthen the economic base of the state.

Another means to avoid waste of financial and technical assistance is to ensure that departments of state government are responsible for implementing the EOAA, especially by searching for viable businesses that are in danger of closing. California law, however, does not require the DEBD to perform any outreach functions.<sup>153</sup> Thus, the statute creates a

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145. Houck Letter, *supra* note 115.

146. CAL. GOV'T CODE § 15330(f) (West Supp. 1984).

147. Goldberg Interview, *supra* note 119.

148. CAL. UNEMP. INS. CODE § 10527 (West Supp. 1984).

149. Squire Interview, *supra* note 134.

150. CAL. GOV'T CODE § 15330(f) (West Supp. 1984).

151. See Employee Ownership Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West). Unfortunately none of the EOAs currently in effect mention the necessity of feasibility studies nor expressly provide for their funding. *But see supra* note 110 & accompanying text (Michigan statute provided for feasibility studies).

152. C. SQUIRE, *supra* note 3, at 21; EMPLOYEE OWNERSHIP, *supra* note 66, at 27. See generally L. WINTNER *supra* note 13, at 7-33 (case studies of employee buyouts in which feasibility studies were conducted).

153. CAL. GOV'T. CODE § 15330(f) (West Supp. 1984). In fact, only New York requires



relatively passive role for the DEBD in the employee buyout process because the Agency must wait until assistance is requested by workers or other groups interested in a buyout.<sup>154</sup> Consequently, potentially successful economic enterprises may close without any buyout attempt if the employees fail to attempt a buyout or to request assistance, while less economically promising buyouts may be assisted simply because these employees requested DEBD assistance.

Finally, the success of EOAs depends, in part, upon the cooperation between the involved groups: the community, the company, the labor organization, and the employees.<sup>155</sup> The few EOAs presently in effect, however, do not require that the implementing agency solicit or encourage the cooperation of these groups. The Michigan statute was the exception, permitting the Department of Labor to promote efforts by private as well as public agencies in the formation of an employee-owned corporation.<sup>156</sup> Even this limited provision, far less than an express mandate, made the Michigan statute more effective than the California statute, which does not encourage any involvement from non-governmental organizations.<sup>157</sup>

The shortcomings of these various EOAs illustrate that this type of legislation essentially functions merely as a policy statement. EOAs constitute a strong public statement endorsing employee ownership as one solution to a plant closure. The Acts reinforce this policy statement by providing that some state administrative attention and funds be directed to the promotion of employee ownership. They fail to provide, however, adequate guidelines to the administrative departments responsible for encouraging employee ownership. For example, California's EOAA requires the Department of Economic and Business Development to assist the formation of an employee-owned operation by providing technical assistance.<sup>158</sup> The Act, however, does not elaborate on the nature of the technical assistance nor the manner of providing it.

Broad mandates are not enough to help workers deal with a complex plant closure situation and to develop buyout strategies. The administrative agency as a whole may have no knowledge of, interest in, or time to learn about employee ownership and plant closures. If so, its assistance will be of limited value. In some agencies particular individu-

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the implementing department to engage in such an outreach program. *See supra* note 108 & accompanying text.

154. *See* Letter from Kathleen P. Starrick, Manager, Office of Program Development, Illinois Dept. of Commerce and Community Affairs to Author (Nov. 4, 1983) (discussing the Illinois Ownership Assistance program and the fact that no company or prospective employee owners have availed themselves of this service) (copy on file with the *Hastings Law Journal*).

155. *See supra* note 142 & accompanying text.

156. MICH. COMP. LAWS ANN. § 450.753(f) (Supp. 1983) (lapsed July, 1984).

157. *See* Employee Ownership Act of 1983, ch. 998, 1983 Cal. Legis. Serv. 5347 (West).

158. *Id.* § 4f.

als may have experience with, or may take the initiative to learn about, employee-ownership and thus be capable of developing and implementing plans to support buyouts. However, a successful response to a plant closure is too important to leave to coincidence.<sup>159</sup>

Furthermore, EOAs generally do not provide a means by which the legislature can oversee the departments to determine whether they are being successful or even conscientious in carrying out their responsibilities.<sup>160</sup> Without some follow up requirements, administrative agencies may become lax or ineffectual in fulfilling their duties, especially in the absence of a strong legislative mandate to implement the EOAA. Unless these agencies provide effective support for employee buyouts, even the limited goals<sup>161</sup> of EOAs will not be met.

In addition, EOAs cannot effectively encourage employee ownership unless they can be fully utilized by employees affected by plant closures. A serious flaw in all EOAs is that they fail to require employers to give notification of the impending closure. Although the Michigan statute did provide for voluntary notification, in a four year period marked by thousands of plant closings only one company complied.<sup>162</sup>

An employee buyout is a complicated and time consuming process. Studies must be made to determine if the business is viable, funding sources must be found, and decisions concerning the form of ownership must be made. Most importantly, the workers must be organized and prepared to take over the business in order to run it productively and profitably. Therefore, notification is necessary to provide employees with sufficient lead time to ensure a successful buyout. Lack of sufficient lead time is one reason why employee buyout efforts, assisted under Michigan's statute, were not more successful.<sup>163</sup>

Legislators have been reluctant to impose notification requirements on employers. For example, plant closing legislation that requires notification of an impending closure has been extremely controversial and difficult to enact.<sup>164</sup> In the face of such opposition to plant closing legislation, legislators have turned to EOAs as an alternative response to plant closures.

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159. Squire Interview, *supra* note 134.

160. See statutes cited *supra* notes 93-96. Only Michigan required a report from its Department of Labor about the department's progress in supporting employee buyouts. See *supra* note 117 & accompanying text.

161. The primary goal of EOAs is to assist workers when they confront the complexity of employee ownership options, laws, financing sources, etc.. See generally *supra* notes 93-139 & accompanying text.

162. Houck Letter, *supra* note 115.

163. *Id.*

164. See *supra* note 60 & accompanying text. There are many arguments against plant closing legislation, including the belief that it is a significant governmental step into areas traditionally considered to be management's domain. M. BOLLE, OVERVIEW OF PLANT CLOSING, *supra* note 3, at 13-21; see also Floss Letter, *supra* note 60.

EOAAs have not been promoted as substitutes for plant closing legislation, but they have been pursued as an alternative method for addressing the problem of plant closures.<sup>165</sup> EOAA's do not approach a potential plant closure from the same perspective as plant closing legislation. They do not regulate the employer's decision to close a plant or provide compensation to the workers displaced by a closure. Rather, EOAA's are a more politically palatable mechanism for the state to have some influence over a plant closure. Because they are not designed to accomplish the same goals as plant closing legislation, EOAA's cannot be criticized for failing to accomplish these goals. However, legislators, by failing to include pre-notification provisions in EOAA's, have run the risk of making EOAA's ineffective in promoting employee buyouts. Without notification, by the time employees find out their employer is shutting down the workplace, it may be too late for a buyout, even with state assistance.

### Recommendations For Improving EOAA's

EOAA's could be more effective if they contained implementation guidelines. One useful implementation measure would be to require that the implementing agency allocate funds specifically for employee-ownership assistance, rather than leave funding to the department's discretion. This would help ensure that the department will take an active role in promoting employee ownership. An EOAA should also require the state to appropriate funds for this purpose. In California, it is especially important to ensure that the DEBD receives private or state funding because in the absence of funding, it is not required to support employee ownership.

Although legislative authorization for funding may be difficult to obtain in these days of fiscal restraint, advocates of EOAA's should emphasize that plant buyouts may well be cost-effective. If a plant closes and buyout efforts are not made or are unsuccessful, state money will probably be spent on welfare and unemployment benefits.

The EOAA should also require that once funding for employee-ownership assistance is allocated, a portion of the funds must be spent on salary for permanent staff in the departments responsible for implementing the employee-ownership assistance statute. The departments should be required to spend this money not only on salary, but also on staff training so that the agency responsible for assisting buyouts will provide informed and effective assistance to employees.

Additionally, the EOAA should promote buyouts that are likely to succeed. Specific provisions should be included in EOAA's requiring funding for feasibility studies. If the legislature is reluctant to provide

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165. See *supra* notes 93-103 & accompanying text.

direct state funding for these studies, an alternative approach should be adopted. For example, the initial EOAA proposals in California offered tax incentives to employers who helped to finance a feasibility study.<sup>166</sup> Similar feasibility study provisions should be incorporated into EOAs.

Another implementation guideline is to require that the act specify the kind of technical assistance to be provided by the responsible agency. For example, departments should be required to provide assistance to employees in choosing the form of ownership of the business. Similarly, departments should be instructed to gather and to provide information concerning the different tax, security, and financing regulations which will affect each form of ownership. Finally, the departments should make information available to employees regarding their prospective income from, and liability for, the business.

Furthermore, the EOAA must be designed to ensure that the responsible agencies implement the mandate of the statute to support employee ownership. A requirement for periodic reports to the legislature from the implementing agency, such as those that were required by Michigan,<sup>167</sup> should be incorporated into all EOAs.

In the absence of widespread adoption of plant closing legislation, EOAs must include some notification requirement. Knowledge that a plant will close is essential for a successful employee buyout. If employees, communities, and the government do not have adequate notice, they can only make hasty attempts to purchase the plant and save jobs. The success rate of employee buyouts would increase if these groups were provided with enough notice to evaluate properly the business' viability and to develop appropriate, effective buyout plans and employee ownership structures. If legislation requiring mandatory notice cannot be enacted through plant closing acts or through EOAs, then at least voluntary notice should be required.

Finally, EOAs should contain provisions mandating that the implementing department take an active role in promoting employee ownership. This can be done in a number of ways. First, businesses, unions, and interested community organizations should be contacted and informed about the act. Second, the department should educate workers and communities about the telltale signs of an impending plant closure and suggest that if a closure is likely, an employee buyout may be an appropriate solution. Third, the department should make attempts to discover plants in danger of closing and to encourage both the owner and employees to consider a buyout, if the business appears to be an economically viable operation.

By taking an active role, the state agency will be generally more effective in saving jobs through employee buyouts. More workers and

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166. See *supra* note 132 & accompanying text.

167. See *supra* note 117 & accompanying text.

communities will know about the possibility of using an employee buyout to prevent a plant closure, and they will be better informed about how to make the buyout successful.

It is especially important for the agency to take an active role when there is no notification requirement imposed by the statute. Without notification from the company, employees must learn to detect indications of an impending closure in order to deal with it effectively.

The linchpin in the series of recommendations made above is the requirement for adequate notice of the plant closure. The outreach and funding recommendations, however, can be complementary strategies used to ensure that employees with notice of a closure have at their disposal much of what is necessary for a successful employee buyout. The outreach provisions are absolutely essential as long as mandatory notice requirements are nonexistent.<sup>168</sup>

### Conclusion

In certain circumstances, an employee buyout is an appropriate alternative to a plant closure. Employees, communities, and states benefit when a plant remains in operation because of a successful employee buyout. Legislation, such as EOAA, that encourages and supports employees in a buyout attempt is an extremely important part of the buyout process. The buyout and subsequent employee ownership of a business can be complicated. Technical, financial, and other forms of state assistance can help employee-owned companies through troubled times. Although EOAA is not the only appropriate legislative response to the plant closure problem, EOAA must be developed as part of an overall state response to plant closures.

Employee ownership, however, may not be appropriate for every plant that is in danger of closing. Moreover, employee buyouts take time to effectuate. Unless employees have adequate notice, they will not be able to utilize EOAA even if a buyout is appropriate. Further, in order to be effective, EOAA must provide implementation guidelines, including specific provisions that regulate how funding will be generated and spent. Otherwise, the governmental departments responsible for implementing EOAA policies may not spend their time, energy, and money in ways which effectively assist employee buyouts and ownership.

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168. New York has put emphasis on outreach in its EOAA. N.Y. COM. LAW § 104-a (McKinney Supp. 1983); *supra* note 108 & accompanying text. Legislators should pay attention to how well this strategy works.

\* Member, Third Year Class.